

BOOK REVIEWS

European Economic Community: Trade and Investment

Edited by Joseph J. Norton, New York: Matthew Bender & Co. 1986,
Pp. 790, \$75.00.

This second volume in the new series of Southern Methodist University on international finance is based largely on a conference held at the twenty-fifth anniversary of the European Economic Community (the EEC) in 1983. Well-rounded by Dr. Norton's overview of the history and legal issues of the EEC and Dr. Simmonds' political update, it provides comprehensive coverage of the EEC's business-related laws. Reknowned experts in their respective fields from the United States and Europe explain often-neglected aspects of international trade and finance. Since the conference, legal development in the EEC has not been extensive; most of it is either included in the update or has been anticipated by the authors.

In his preface Dr. Oliver points out the present and potential future impact of the EEC on international relations. The first chapter, by Dr. Norton, contains necessary background and classifies problems to be covered. Professor Buxbaum next discusses thoroughly the legal framework of doing business in or with Europe. He covers company merger, joint venture and antitrust laws, reciprocity in investment between the U.S. and Europe, and EEC macroeconomic policy. Most of these topics reappear in more detail within later contributions, a demonstration of the sensible structure of this volume.

The next chapter, by Dr. Bebr, elaborates on the scope, ranking, implementation, and enforcement of EEC laws. Ms. Minch then covers the EEC decision making procedure, including the lengthy debate on the unanimity principle. The problems in decision making are illustrated by a recent decision of the European Court of Justice (the ECJ). The Assembly had complained against the Council because of the latter's inertia

in traffic related matters.¹ Dr. Steenbergen next analyzes the ECJ's function, jurisdiction, and importance within the EEC. These insights into the EEC law making system are critical for the international lawyer involved in EEC related financial and business transactions.

Part III considers, on a macroeconomic level, the interaction of legal and economic issues within the U.S.-EEC relationship. Former United States Trade Representative, the Honorable R. Strauss, provides a general introduction into this topic. Dr. Murphy next discusses the Customs Union and its partially protectionist effects on countries outside EEC trading areas. In the next chapter Dean Perrot relates the abstract legal framework and related problems of EEC commercial policy to their practical application in the pursuit of individual commercial rights before the EJC.

The conflict between the protection of small farmers and the attempt to ensure reasonable consumer prices has made the EEC's agricultural policy the most controversial point within the process of integration. On the other hand, this conflict best exemplifies common action of the Member States. The controversy extends well beyond the EEC's borders, as is illustrated by the differing points of view of Dr. Norton and Mr. Corboy, the former from the American, and the latter from the European perspective. A cost-benefit analysis by Professor Smith concludes the discussion of the agricultural sector.

To a considerable degree, business relations between the U.S. and the EEC are influenced by bilateral or multilateral treaties. Because the Friendship, Navigation, and Commerce Treaties have been on a bilateral basis with Member States only, Dr. Norton examines their renewal and their adaptation to existing and upcoming problems with the EEC.

The microeconomic discussion in part IV focuses on the enterprise. Mr. Seche examines the rights of individual companies to establish themselves and to provide services under EEC law. Dr. Behrens covers recent developments in company laws due to the process of harmonization. The Seventh and Eighth Directives that he mentions as proposals have since been passed by the Council² and await transformation into national law by the Member States. Today no prudent business decision should neglect the applicable tax laws and accounting standards. Dr. Grossfeld's careful analysis renders accessible these often confusing topics.

Mr. von Kalinowsky provides useful insight into the legal framework of patents and licensing, traditionally high priority questions for U.S. enterprises. He proposes a group exception from the antitrust provisions to ease their application. Dr. Sandrock explicates EEC antitrust laws and

1. *European Parliament v. E.C. Council*, 1985 E. Comm. Ct. J. Rep. No. 13/83, 45 Comm. Mkt. L.R. 138 (1985).

2. O.J. EUR. COMM. (No. L 193) 1 (1983); O.J. EUR. COMM. (No. L 126) 20 (1984).

their implementation by a comparative approach to American antitrust laws. He stresses the contributions towards predictability that the ECJ has made in this field, an example of which is EEC supremacy over national antitrust laws.

Dr. Norton develops the respective attitudes of the U.S. and the EEC in extraterritorial application of their antitrust laws. Drawing upon various cases, he proposes the furtherance of an international agreement, or, second best, an interest-balancing approach. Two antitrust cases since decided by the Commission, however, suggest an extension of the jurisdictional scope.³ Finally, private international law aspects are taken into account. Dr. Baade focuses on the governmental interest analysis contemplated by article 7(1) of the EEC Contracts Convention of 1980. He points out parallels to controversial cases during past years, such as the Yamal-pipeline dispute, and seems less critical towards extraterritorial application of jurisdiction. Unfortunately the volume does not address the EEC law on antidumping and countervailing duties, an area that might well affect U.S. enterprises.

Part V discusses economic and monetary aspects of trade and investment within the EEC. Dr. Seche investigates the scope of free capital movement and current payments. Dr. Norton provides a chronological overview of the EEC's development towards an economic and monetary union. Next Mr. Dixon evaluates the most important accomplishment so far, the European Monetary System. Sir Joseph Gold provides a comprehensive comparison of the International Monetary Fund's Special Drawing Rights and the European Currency Unit (the ECU). Although the ECU alone cannot bring about convergence of policies, Sir Joseph Gold predicts its increased importance in the future.

In the last chapter of part V, Dr. Simmonds balances pros and cons of a further enlargement of the EEC (Portugal and Spain had not then joined). He proposes the development of meaningful Euro-Arab dialogue to accompany growing trading relations. The importance of this point, however, may be undercut by the recent decline in oil prices.

The volume also discusses external affairs, the EEC's impact on the international political setting. Professor Carl investigates effects of the concept of integration on other countries, in particular developing nations. Two chapters cover the Atlantic Alliance and its outlook upon further

3. Jurisdiction was exercised over a price cartel of foreign cellulose producers (including 11 U.S. companies). The Commission argued that the cartel was restricted to EEC imports, covered 60% of the Community's imports, and some of the companies involved had subsidiaries within the EEC. See O.J. EUR. COMM. (No. L 85) 1 (1985). Furthermore, a prohibition order was issued against the "Aluminium Cartel" consisting of Eastern European foreign trade associations. See O.J. EUR. COMM. (No. L 92) 1 (1985).

integration of the EEC countries. Dr. Lellouche covers the European, and Mr. Fischer the American point of view. Although neither of them believes in a future without the North Atlantic Treaty Organization, Mr. Fischer considers dangerous to the world's political order reduced U.S. security guarantee and political leadership such as Mr. Lellouche proposes.

In a concluding perspective piece Dr. Stein reflects on the EEC's achievements. Within the decision making process the influence of the EEC Council, rather than the Commission, draws his criticism. He quotes Professor Haas's reference to the combination of quasi-federal administration with basic decision making remaining in the nations' capitals as a state of "asymetric overlap."

No doubt, any practitioner who handles international business transactions needs solid insight into EEC law. This publication provides such insight in an exemplary way. The structure of this volume and the expertise of its authors make it a reliable, extremely helpful piece of work that can also serve as a reference manual.

Matthias K. Hentzen
Assistant, Institute of Private
International and Comparative Law,
University of Muenster, Muenster,
West Germany

The Law Merchant: The Evolution of Commercial Law

By Leon E. Trakman, Littleton, Colorado: Fred B. Rothman & Co, 1983, Pp. xi, 195, \$35.00.

For me, one of the surprises of legal education, both in Germany and in the United States, was that those terms, principles, and concepts that seemed to be most simple, were really the most difficult to grasp with certainty and describe with accuracy. The "law merchant" in many respects supports this proposition. As a law student I would not have hesitated to define law merchant.¹ However, the more time I have given to the study of law, the greater has become my hesitation in face of the

1. The term law merchant is philologically peculiar: "law of merchants" or "mercantile law" would seem to be preferable to law merchant, which appears to be an outmoded translation of the Latin *lex mercatoria*.

apparently simple question: what is law merchant? What role, if any, does it play in our modern world? Is law merchant a concept of national law only or is there also a universal law merchant?

The task of defining law merchant, or, more precisely, of reaching an agreement on what lawyers and law professors mean by law merchant, no doubt, is a difficult one. Indeed, the very reality of law merchant is open to challenge. Some legal writers have doubted the existence or at least the legal character of the law merchant.² For some, most notably the "analytical" schools of jurisprudence, law merchant today is little more than a euphemism for commercial morality, a reflection of shared values of the mercantile community falling short of law.³ The fact that law merchant is relied upon by American courts only infrequently and that it is usually only of minor importance for judicial decisions in this country,⁴ and the difficulties that courts have faced in discerning law merchant seem to provide empirical support for these authors' views.

For others, law merchant emanates from the mercantile community's own free will as reflected in customs, usages, and practices generally accepted as expressing fundamental principles that regulate the relations between and among the members of the community and that transcend political boundaries.⁵ From this perspective, law merchant is definable or describable as the standard of conduct at a given time for merchants and traders arising from mercantile customs, usages, and practices, certain of which may be recognized by courts or arbitrators as obligatory, and others of which may be recognized as nonobligatory, depending on the subject matter and their status at a particular time. For the proponents of this rule-oriented view, law merchant is not static; rather, it is in a more or less continual state of change and development.

Despite the formal adherence to traditional, rule-oriented views, however, modern law merchant scholarship seems to have come to conceive of law merchant from a wider, more behaviorally responsive perspective. This has been due partly to the expanding complexity of trade and commerce both nationally and internationally and partly to a growing sophistication about law, the legal process, and other forms and instru-

2. See, e.g., Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495, 1508 (1984).

3. *Id.*; Ewart, *What Is the Law Merchant?*, 3 COLUM. L. REV. 135 (1903).

4. See Winship, *Contemporary Commercial Law Literature in the United States*, 43 OHIO ST. L.J. 643, 645 n.8 (1982), citing *Pribus v. Bush*, 118 Cal. App. 3d 1003, 173 Cal. Rptr. 747 (1981), as one of the few examples of American cases in which law merchant was looked to for answers on a question where the Uniform Commercial Code was silent.

5. See, e.g., BLACK'S LAW DICTIONARY 890 (5th ed. 1979); Thayer, *Comparative Law and the Law Merchant*, 6 BROOKLYN L. REV. 139 (1936).

mentalities of modern dispute resolution, including commercial conciliation and arbitration.⁶

I. In Search of the "Modern" Law Merchant

Irrespective of their final conclusion, all schools of thought, at one point, have to address the following questions: is there a consensus among merchants and traders on what is generally, or at least widely, accepted as standards of conduct and behavior of the (inter-)national commercial community? And, if so, what is the relation between those standards and commercial law? In his book *The Law Merchant*, Dr. Leon E. Trakman attempts to provide the answer to, or at least throw further light on, these central questions. The book is subtitled *The Evolution of Commercial Law*. Yet, its principal aim is not to analyze the genesis and historical development of commercial law. The author's concern is a more fundamental one: he wants to make a case for the existence of widely accepted commercial standards that can guide courts in deciding commercial disputes, domestically as well as internationally, in the old law merchant tradition. On the appealing premise that "[h]istory *does* provide lessons for the future" (p. 17), the author highlights, however, the evolution of the law merchant. He provides the reader with a historical sketch of the development of the law merchant in Medieval Europe in Chapter One and its influence upon the development of commercial law in continental Europe and mercantile law in England in Chapter Two. Chapter Three is devoted to the law merchant's impact on the international law merchant.

Dr. Trakman points out that law merchant developed within England as a largely separate system existing parallel to the common law (pp. 7-21). By the 17th century, however, it had substantially assimilated into the common law, although it retained a separate significance as judges recognized distinct commercial rules based upon practices, habits, and usages of merchants, traders, and businessmen (pp. 27-33). By the late 19th century, most of the law merchant in England had been incorporated into statutes. As a result, "the Law Merchant lost some of its identifying characteristics in English law" (p. 29). As the author intimates, this "in effect reduces the function of the Law Merchant to an uncertain role in our common law system" (p. 29). Dr. Trakman emphasizes, however, that "merchant practice was recognized as valuable in American law" (p. 32). He cites *Kuniglich Jarnvagsstyrelsen v. Dexter and Carpenter*⁷ and *Dixon, Irmaos and Cia. v. Chase National Bank*⁸ for his proposition that

6. See, e.g., Swan, Book Review, 30 MCGILL L.J. 164, 166 (1984).

7. 299 F. 991 (S.D.N.Y. 1924).

8. 144 F.2d 759 (2d Cir. 1944).

the law merchant "thrives in American law, more so than elsewhere in common law jurisdictions" (p. 36). According to Dr. Trakman, "under the influence of legal realism, American judges have translated merchant practice into law; they have recognized trade habit and commercial usage; and they have modeled commercial law upon the functional needs of an increasingly interdependent society of merchants" (p. 36).

Dr. Trakman then turns the reader's attention to "[t]he movement towards a universal law of international trade" which, in his view, "has a solid rationale in the conventional community of merchants" (p. 39). He sees the growth of a "new" law merchant, "closely resembling its medieval forefather" (p. 39). Much of this law merchant is, according to Dr. Trakman, "already evident" (p. 40). The INCOTERMS, the Uniform Law of International Sales, and the Rules of the International Chamber of Commerce are referred to by the author as examples of instruments through which "business usages have been blended with concepts of the common law and the civil law" (p. 41).

II. The "Modern" Law Merchant and International Oil Contracts

Modern transnational contracts, too, demonstrate, as Dr. Trakman points out, "the ability of merchants engaged in world trade to exercise a freedom of choice in determining the nature and limits of their commercial obligations" (pp. 40-41). This observation is based upon Dr. Trakman's analysis of agreements of the international oil industry. The objective of his analysis was to assess the interdependence that exists between commercial practice and commercial law in multinational oil transactions (p. 45). Dr. Trakman confined his study to a comparatively narrow, yet practically very important aspect of international trade: the attitude towards non-performance expressed by lawyers of companies engaged in the purchase and sale of crude oil in international markets (p. 119). The problem of nonperformance is evident in this business as the risk contingencies of the international oil market cannot always be foreseen clearly by the drafters of international oil contracts. The disruption of crude oil supply coupled with severe fluctuations of oil prices and the effects of fluctuating exchange rates of the major currencies which occurred in the 1970s illustrate this point. On the other hand, like any other contract, international oil contracts have an obvious need for clarity of contents and predictability of results (pp. 49-50).

Dr. Trakman's observations are based upon a series of interviews and questionnaire studies.⁹ In his study, the author seeks "to assess the in-

9. The questionnaire is reproduced on pp. 121-33 of Dr. Trakman's book.

terrelationship between commercial and legal methods of governing non-performance in multinational crude oil sales" (p. 45). These studies focus upon three questions: (1) how do written contracts for the sale of crude oil affect nonperformance obligations in multinational oil sales; (2) how are performance difficulties resolved between oil sellers and oil buyers; and (3) can adjudication and arbitration be an alternative means of resolving disputes over performance (pp. 45-46). The author's study of the responses reveals that nonperformance in international contracts for the sale of crude oil are the "product of deliberate planning and compromise" (p. 47). The parties to such contracts try to ensure "that crude oil transactors would not be left in doubt as to the nature and extent of their performance duties and as to their respective responsibilities in the event of nonperformance" (p. 47). Dr. Trakman observed that "international contracts for the sale of crude oil have been adopted to take account of changed circumstances" (p. 49), such as *force majeure*, and to avoid disputes, for example those stemming from ambiguities in the parties' agreement (pp. 50-53). To accomplish these goals, the drafters of international oil contracts, according to Dr. Trakman, often supplement their carefully drafted bilateral documents with an express choice of a suitable law and forum and, on occasion, by embodying "usages prevailing in the oil industry" to solve disputes over nonperformance (p. 59). As Dr. Trakman concludes, "Business and legal usage was . . . a pronounced attribute of the oil agreement and a reflection of the International Law Merchant" (p. 59).

The author admits, however, that "profound" difficulties still arise in establishing the parameters of an all-encompassing modern Law Merchant" (p. 42). Dr. Trakman attributes these difficulties to the fact that "[n]ational systems of law remain jealous of their jurisdiction over world trade" (p. 42) and that "[m]ercantile customs are often difficult to unify within a single international system of commercial law" (p. 42). Moreover, Dr. Trakman suggests, "dissimilarities in approach among legislators, administrators, judges and merchants are capable of complicating the movement towards the 'harmonization' of international trade law" (p. 42). Dr. Trakman emphasizes, however, the need for a resurgence of the law merchant:

The Law Merchant stands for continuity; it is definitive in form yet malleable in content; it is deliberate in design yet flexible in operation. Properly utilized, the law merchant represents a crucial meeting point between law and commerce. Properly applied, it serves as the herald of success and failure in the legal regulation of world trade (p. 105).

To promote the "new" law merchant, Dr. Trakman suggests that common law courts consider three principles in regulating international transactions (p. 103). First, he suggests that courts should not disregard the

history of international trade: "[T]o apply the common law in disregard of the history of international trade is to construe trade within a factual-legal vacuum" (p. 103). Second, Dr. Trakman suggests that courts construe international agreements in accordance with the concordant will of the parties in mind: "[T]o disregard the fact that international contracts often embody elements which are foreign to the common law is to seriously undermine the manifest will of the parties in the process of construction" (p. 103). And third, Dr. Trakman suggests that courts construe international contracts in light of trade custom: "[T]o make assumptions as to what is 'reasonable' in international trade principally on the basis of judicial supposition is to deplete the sanctity of the international agreement in favor of judicial conjecture" (p. 103). This makes it necessary, in Dr. Trakman's view, for courts to appreciate "that international business practice is a primary source of law; how merchants act is a necessary concern in determining how they ought to act in law" (p. 102). Thus, rather than following a deductive method as to what is permissible or acceptable in light of governmental or judicially created protective policies, Dr. Trakman proposes to permit merchants themselves to create "the parameters of permissibility in business" (p. 98). In the words of Dr. Trakman, "Legitimacy as a question of law therefore depends upon legitimacy as a matter of business practice" (p. 100). From this perspective, law only supplements "that which businessmen themselves have created" (p. 98).

III. Critique and Conclusion

Dr. Trakman's study, no doubt, will provoke much scholarly discussion.¹⁰ The questionnaire-based study, like other forms of empirical research, may not offer conclusive evidence of the existence of a "new" law merchant, a body of generally accepted principles or rules of conduct of the (inter-)national mercantile community, sufficiently specific to serve as a basis of judicial decisions.¹¹ The study may not even provide hard evidence to confirm the hypothesis that there are usages and habits pre-

10. The reactions so far have been rather critical. See Swan, *supra* note 6; Williams, *supra* note 2. But see also Baxter, *International Conflict of Laws and International Business*, 34 INT'L L. & COMP. L.Q. 538, 548-49 (1985). While I do not agree with most of his substantive comments, I share Professor Williams' technical criticism that Dr. Trakman's book is needlessly repetitious. Williams, *supra* note 2, at 1495 n.3. But this redundancy seems to be the almost inevitable consequence of the fact that many law schools in this country, unlike most of their continental European counterparts, accept doctoral dissertations comprising of several pieces of research, often published separately, on a series of related issues, rather than on one legal topic. This practice not only furthers redundancy but also hinders the production of inherently consistent pieces of legal research.

11. Williams, *supra* note 2, at 1508.

vailing in the oil industry that not only supplement but also supplant traditional contract law.¹² Dr. Trakman's study indicates, however, that behavioral rules of the commercial community, in some cases, have acquired contractual and thus legal recognition and that they are being enforced by courts as well as arbitrators. Furthermore, the study suggests that many of the substantive differences observed by the author dissolve, in the final analysis, into matters of emphasis and detail.

For example, some of the more important differences that the author found to exist between the answers to common lawyers and those of civil lawyers in the international oil business indeed would seem to derive not from contract theory but from particular economic or political experience, legal education and political training, special social perceptions, and divergent judicial techniques (p. 46). The remedies for cases of unforeseen conditions and circumstances illustrate this point. In this context, Dr. Trakman observed that "[c]ivil lawyers were generally much more willing to permit excuses from performance in the face of circumstances occurring beyond control than were their common law counterparts" (p. 47). This observation will not come as a surprise to civilians or comparatists since the parameters of legal and equitable remedies are shaped more by differing historical and doctrinal emphases than by fundamental differences in the legal systems' respective conceptions of contracts.¹³ While the common law traditionally has preferred money damages over specific performance, specific performance has been the rule, rather than the exception, in most civil law systems. The civil lawyers' willingness to permit discharge in situations where performance has become extremely onerous but not literally impossible, is thus a necessary consequence of the historical and doctrinal differences that exist between the two legal traditions mentioned.

The variations and attitudes reflected in the answers of the participants are to a large extent marginal when viewed from a general perspective. Certainly, there are legal differences in the rules and legal perceptions respecting nonperformance and these differences will, on occasion, produce significantly different results. But these differences are minor variations within a broader congruency. The degree of agreement among lawyers in the international crude oil business reflects the notion that the obligee's reasonable expectations ought to be protected and that the obligor's duties ought to be enforced reasonably. This principle applies with-

12. Swan, *supra* note 6, at 170.

13. See A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 1122-23 (1977); see also M. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 1011-27 (1985).

out exception to the societies and economies served by the legal orders represented in Dr. Trakman's study.

Dr. Trakman's study teaches us, it seems to me, one important point: the need to distinguish carefully between law merchant as a body of domestic legal principles and the international law merchant (which, especially in continental Europe, is known and referred to as *lex mercatoria*¹⁴). This distinction is, I think, not clearly made by Dr. Trakman. While it has never ceased to exist domestically, the law merchant plays a rather marginal role, if any, in contemporary domestic commercial relations—at least in the United States. Law merchant has been incorporated in a number of modern statutes in this country, particularly in the area of business law.¹⁵ Yet, it is relied upon by courts only infrequently. And as the *Pribus* case¹⁶ indicates, where the law merchant produces undesirable legal solutions, the legislature will, without delay, remedy the situation.¹⁷ Dr. Trakman's proposition that the law merchant "thrives in American law, more so than elsewhere in common law jurisdictions" (p. 36) thus is, I believe, unfounded and implausible. Internationally, a different perspective seems to be appropriate, however. The term law merchant, as Professor Thayer pointed out more than forty-five years ago, always has carried with it "a notion of universality."¹⁸ I agree therefore with Dr. Trakman that to deal with contemporary international commercial relations entirely in terms of national law is to take the risk of dealing with them inadequately. The proliferation of international commercial contracts which do not contain an express or implied choice of law, but which expressly refer to generally accepted principles of the industry, has led to a wholly new body of regulatory principles, the legal, sociological, and economic significance of which continues to be worth exploring carefully.

14. See, e.g., Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 19 (N. Horn & C. Schmitthoff eds. 1982); Bonell, *Das Autonome Recht des Welt-handels—Rechtsdogmatische und Rechtspolitische Aspekte*, 42 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 485 (1978); Goldman, *Frontières de Droit et Lex Mercatoria*, 1964 *ARCHIVES DE PHILOSOPHIE DU DROIT* 177. The resort to the Latin term *lex mercatoria* indicates that on the one hand the contours of the international law merchant are still somewhat blurred and that on the other hand the international law merchant is truly universal rather than merely national or local in nature.

15. See, e.g., U.C.C. § 1-103 (1978); Uniform Partnership Act § 5 (1913).

16. *Pribus v. Bush*, 118 Cal. App. 3d 1003, 1008, 173 Cal. Rptr. 747, 749 (1981) ("law merchant permits the use of an allonge only when there is no longer room on the negotiable instrument itself to write an endorsement").

17. Effective September 20, 1982, the California legislature added the following sentence to U.C.C. § 3-202(2): "An endorsement on a paper so affixed shall be valid and effective even though there is sufficient space on the instrument to write the endorsement." CAL. COMMERCIAL CODE § 3202(2) (West 1987).

18. P. THAYER, *CASES AND MATERIALS IN THE LAW MERCHANT* v (1939).

To understand and interpret such modern phenomena as international contracts for the exchange of vitally necessary resources, such as crude oil, it seems to me, we must reorient our thinking. In particular, we must overcome the traditional distinction between binding national rules of commercial law and other forms of operative principles which result from self-determinative interaction in the commercial sphere, reflecting the concordant wills and accepted behavior of individuals at a given point of time. In this respect, Dr. Trakman's study has made a point that deserves to be supported. Certainly, some definitions of law would seem to exclude international law merchant. Yet, insistence that there are no rules governing the relations between merchants other than those resulting from governmental action or judicial creation, is inspired by the old dogmatism that any form of social and economic structure that is not reducible to governmental orders backed by judicial enforceability can only be a form of rule falling short of law. This dogmatism seems to overlook that law merchant historically evolved in the absence of governmental action. What we need at this point is a new future-oriented, more usable conception of the international law merchant that is based upon the notion that "[f]reedom to transact is a necessary component in the evolution of international business" (p. 97). The most appropriate conception, I think, requires emphasis on thinking of international law merchant in functional rather than institutional terms. And from such a perspective we need to acknowledge its gradual evolution and reality, even in the absence of exact empirical and other proof.

Those authors who have questioned the very reality of an international law merchant seem to ask and answer the wrong questions. What matters is not whether generally accepted commercial standards are easily discernible by the judiciary or private arbitrators (one must recognize that most legal and professional standards are inherently vague, but still subject to resolution).¹⁹ What matters is whether law merchant is reflected in the dealings of merchants both nationally and internationally. Furthermore, the question is not whether international law merchant is effective, it is whether there is a body of operative principles that respond and correspond to existing or future needs of an ever-changing commercial environment. And most importantly, the question is not whether inter-

19. We have, for example, become accustomed to accept the existence of, and have learned to cope legally with, sociologically and legally novel bodies of private regulation, such as generally accepted accounting principles and auditing standards. See Ebke, *In Search of Alternatives: Comparative Reflections on Corporate Governance and the Independent Auditor's Responsibilities*, 79 Nw. U.L. Rev. 663, 705-09 (1984). Another recent example of legal standards that are not easily discernible, but are used by courts to impose civil liabilities, are the emerging theories of lender liability. See Ebke & Griffin, *Lender Liability to Debtors: Toward a Conceptual Framework*, 40 Sw. L.J. 775, 809-10 (1986).

national law merchant is frequently applied or referred to by courts and arbitrators; rather, whether international law merchant is abided by in practice, whether it governs or influences behavior and thereby produces stability and order and minimizes conflicts.

I am thoroughly convinced that the international law merchant is not only reality, but that it also works. While only some courts might have had an opportunity to determine and adjudicate the international law merchant with authoritative infallibility, there seems to be a certain agreement among merchants on the fundamental content and meaning of international law merchant, even in a world variously divided. A universal legal tradition, a universal socioeconomic system, or a universal commercial ideology thus does not seem to be a prerequisite for the existence or the growth of the international law merchant, since in its essentials the international law merchant responds to interests and needs common to merchants generally. This is not to create a false sense of uniformity; in fact, much of the ever-expanding body of international law merchant may be less than universal in dimension, character and acceptance. The extent of the universality of the law merchant obviously is closely related to the nature of the subject matter, subject to the interests, values and perceptions of merchants, and the doctrinal heritage of judges and arbitrators. But despite such limitations, the international law merchant can, as Dr. Trakman's study shows, be an apt regulator of international business transactions.

The international law merchant's contours may, more often than not, be blurred, and its fundamental ingredients may frequently be unclear. But this familiar weakness of the international law merchant does not vitiate the force or the effect of the international law merchant that exists in the international commercial community. On the contrary, given the significance of international trade as one of the principal sources of the wealth of nations, international law merchant is a promising instrumentality for the balancing of the various interests of the majority of economically underprivileged nations and the minorities of economically developed nations. In this sense, law merchant is self-regulation, a multiheaded process of bilateral risk allocation, involving merchants of all kinds, with authority derived both explicitly and implicitly from community consensus or even expectations that are based upon the parties' general duty of good faith and fair dealing in commercial transactions. The law merchant thus provides a valuable framework that can be implemented by merchants to minimize legal risks and to avoid expensive and time-consuming litigation or arbitration. I do not mean to suggest, as does Dr. Trakman, that "[m]erchants themselves create the parameters of permissibility in business" (p. 98). To recognize a right to more or less unfettered freedom, in the commercial community, from the states' or courts' coercive powers

and arbitrators' supervisory powers is to deny the international commercial community the implementation of protective policies. This would seem to be particularly unacceptable in cases where the parties are not dealing with each other at arm's length. Thus, internationally, like nationally, the law merchant can in my view only supplement, but not supplant the law and the shared values it reflects.

Dr. Trakman deserves thanks for revitalizing the discussion of the (inter-)national law merchant. The study, which on its facts may have only limited applicability, may prove to have an impact far beyond the scope of the problem which it analyzed.

Werner F. Ebke
Assistant Professor of Law
Southern Methodist University*

*I should like to express my thanks to my colleagues C. Paul Rogers III and Peter Winship for commenting upon this review; I hope that they will be lenient with me, since I did not always follow their advice.